90-46

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GENNARO ANGIULO, FRANCESCO ANGIULO,
DONATO ANGIULO, and MICHELE ANGIULO,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE REFUSAL TO IMMUNIZE THE ALLEGED VICTIM OF AN EXTORTIONATE CREDIT TRANSACTION CALLED AS A DEFENSE WITNESS IS CONSISTENT WITH THE DICTATES OF DUE PROCESS OF LAW?

2. WHETHER A TRIAL COURT'S INSTRUCTIONS ON AN EXTORTIONATE CREDIT TRANSACTION COUNT WHICH PERMITTED THE JURY TO CONVICT ON A THEORY ON WHICH THE DEFENDANTS WERE NOT INDICTED NOR TRIED CAN PASS CONSTITUTIONAL MUSTER?

3. WHETHER A TRIAL COURT CAN DECIDE AS A MATTER OF LAW THAT THE GOVERNMENT HAS PROVED SEPARATE AND DISTINCT §1955 GAMBLING BUSINESSES AND REFUSE TO SUBMIT THE ISSUE TO THE JURY?

4. WHETHER A TRIAL COURT CAN REFUSE TO INSTRUCT THE JURY ON THE THEORY OF DEFENSE - MISTAKEN VOICE IDENTIFICATION - WHEN THERE IS CLEAR SUPPORT FOR THAT THEORY IN THE EVIDENCE?

5. WHETHER THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT OF RICO IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE CONDUCT OF THE PETITIONERS, WHEN THE PREDICATE ACTS ALLEGED IN THE INDICTMENT WERE NOT RELATED TO EACH OTHER, BUT ONLY RELATED TO THE ALLEGED ENTERPRISE?

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PETITION FOR WRIT OF CERTIORARI
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Petitioners Gennaro, Francesco, Donato, and Michele Angiulo pray that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in

this case on March 5, 1990.[1]

OPINION BELOW

Petitioners' appeal from their convictions in the United States District Court for the District of Massachusetts was heard by a panel of the First Circuit and said convictions were affirmed, United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990), reproduced in the Joint Appendix at 1A to 110a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 5, 1990. Timely petitions for rehearing on behalf of Samuel Granito and the United States were denied on March 26,

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[1] The other appellant in the First Circuit was Samuel Granito. He has also filed a petition for writ of certiorari and a Joint Appendix on which the petitioners here also rely.

1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. § 1961(5) (West 1984) provides:

> "pattern of racketeering activity"

> requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .
>
> * * * * *

Title 18 U.S.C. § 1962(c) and § 1962(d)(West 1984 & Supp. 1990) provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

On September 19, 1983 a grand jury sitting in the District of Massachusetts returned a twenty count indictment against Gennaro, Francesco, Donato, and Michele Angiulo and three other defendants. Gennaro Angiulo was named in sixteen counts of the indictment, charging him with RICO violations,[2] 18 U.S.C. §1961 et seq.; operating five illegal gambling businesses (numbers betting, North Margin Street card game, Lowell barbooth, Boston barbooth, and Las Vegas nights), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 18 U.S.C. §894(a); the use of extortionate means of collection (Palladino); conspiracy to use

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[2] The predicate acts alleged against Gennaro Angiulo in the RICO charges included the various federal charges also alleged as separate counts, and several murders and conspiracies to murder.

extortionate means of collection (Palladino), 18 U.S.C. §894(a); interstate travel to facilitate gambling, 18 U.S.C. §1952; obstruction of state justice (Roxbury court); 18 U.S.C. §1511; obstruction of justice (LaFreniere and Venios), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Francesco Angiulo was named in thirteen counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating five illegal gambling businesses (numbers betting, North Margin Street card game, Lowell barbooth, Boston barbooth, and Las Vegas nights), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 18 U.S.C. §892(a); conspiracy to use extortionate means of collection (Palladino), 18 U.S.C. §894(a); obstruction of state justice (Roxbury court), 18 U.S.C. §1511;

obstruction of justice (LaFreniere), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Donato Angiulo was named in eight counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating an illegal gambling business (numbers betting), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 19 U.S.C. §892(a); conspiracy to use extortionate means of collection (Palladino), 18 U.S.C. §894(a); obstruction of justice (LaFreniere), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Michele Angiulo was named in four counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating an illegal gambling business (numbers betting), 18 U.S.C. §1955; and

conspiracy to obstruct state justice (Roxbury court), 18 U.S.C. §1511.

Gennaro, Francesco, Donato, and Michele Angiulo and two other defendants[3] proceeded to trial before Judge Nelson and a jury, with empanelment beginning on June 11, 1985. Shortly after the evidentiary presentation to the jury began, defendant Ilario Zannino's case was mistried because of his ill health. The jury returned its verdicts on February 26, 1986. Gennaro Angiulo was found guilty on all but four counts, Lowell barbooth, interstate travel, obstruction of state justice, and obstruction of justice (Venios). The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Francesco Angiulo was found guilty of

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[3] Defendant Vittore Nicolo Angiulo was severed because of ill health. He died before ever being brought to trial.

the RICO substantive and conspiracy counts, four gambling counts (all but Boston barbooth), and the three counts involving extortionate credit. He was acquitted of the three counts charging obstruction of justice (Roxbury court and LaFreniere) and of Boston barbooth. The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Donato Angiulo was found guilty of the RICO substantive and conspiracy counts, the numbers betting count, and the Smoot extortionate credit count. He was acquitted on the other charges. The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Michele Angiulo was acquitted of all charges except the numbers betting count.

On April 3, 1986 Gennaro Angiulo was sentenced to twenty years on the RICO

conspiracy count, a consecutive five year term on the numbers betting count, a consecutive fifteen year term on the Smoot extortionate credit count, and a consecutive five year term on the LaFreniere conspiracy to obstruct justice count. On the other counts he received sentences that were concurrent with the consecutive sentences. In addition to forty-five years of imprisonment, committed fines of one hundred twenty thousand dollars were also imposed.

On April 3, 1986 Francesco Angiulo was sentenced to a ten year term on count one, the RICO conspiracy count, a consecutive five year term on the numbers betting count, and a consecutive ten year term on the Smoot extortionate credit count. On the other counts he received sentences that were concurrent with one of the consecutive sentences. In addition to twenty-five years of imprisonment, committed fines totalling

sixty thousand dollars were also imposed.

On April 3, 1986 Donato Angiulo was sentenced to twenty years imprisonment on Count two, the RICO substantive count, and concurrent terms on the other counts. Fines totalling forty thousand dollars were also imposed.

On April 3, 1986 Michele Angiulo was sentenced to three years imprisonment and a committed fine of five thousand dollars on that count.

The evidentiary facts are briefly discussed in the panel opinion of the First Circuit, but only in the light most favorable to the government. The jury rejected a good deal of the government's evidence by returning fifteen not guilty verdicts, highlighting the importance of appropriate legal rulings even in a "mega-trial".

STATEMENT OF THE FACTS

Palladino

In preparation for the Palladino extortionate credit aspect of its case the government subpoenaed Joseph Palladino's attorney, Regina Quinlan. She responded by filing a motion to quash. In resisting that motion the government filed with the court its Memorandum In Opposition To Attorney Regina Quinlan's Motion To Quash (dated 9/23/85) in which it contended in part as follows at page four:

> "In this case, revealing the name of Attorney Quinlan's client will not implicate him in criminal activity. The Government contends that he was the victim of an extortionate credit transaction, a status which does not subject him to criminal liability." (emphasis in the original).

In discussing whether a stipulation of her testimony could be reached by the parties, the defendants argued that

Palladino, not his attorney, would be the appropriate witness. See Tr. 46:4. At this side bar conference, the government made it clear that it would not call Mr. Palladino because he "would not testify truthfully", see Tr. 46:5, and because he "will do whatever Mr. Gennaro Angiulo tells him to do", see Tr. 46:6-7. A stipulation on Quinlan's testimony was reached and read to the jury. See Tr. 46:87-89.

After the government rested on December 20, 1985, the defendants filed a Motion To Limit Cross-Examination of Prospective Witness, requesting the court to limit the government's permissible cross-examination of Palladino to the area of his proposed direct examination - his alleged status as a loan shark victim. The Motion informed the court that Palladino would assert a Fifth Amendment privilege to other areas of inquiry. The motion was discussed with the

court with the indication being it would be denied, see Tr. 105:51; Tr. 107:93-95, and that Palladino would therefore assert his Fifth Amendment privilege if called as a witness, see Tr. 108:38-41.

The defendants next moved the court for judicial immunity for Palladino. See Defendants' Motion For Judicial Immunity For Defense Witness And Supporting Memorandum Of Points And Authorities. The motion included a proffer of Palladino's clearly exculpatory testimony that he was not the victim of extortionate credit transactions as alleged in counts 13-15.

The government's immediate reaction was to inform the court that both it and Mr. Palladino opposed the motion, and to suggest that the Worcester County District Attorney's Office would be extremely upset with immunity for Palladino because of his

role in the pornography business.[4] See Tr. 45:75.

When the motion was addressed at length later that afternoon the government argued it had made no effort to make Mr. Palladino unavailable because (1) although it had argued that Palladino would lie if called to testify it did not directly communicate that statement to him, and (2) although it had turned over incriminating information about Mr. Palladino's taxes to criminal

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[4] In an article published by the Boston Globe on February 16, 1983 entitled "A rift in organized crime", the Spotlight team claimed to have had access to a summary of an FBI tape recording made of the defendant and two associates in 1981. The article's report of that conversation makes it clear that someone leaked the Palladino tape to the Globe before the indictment was returned in this case. This leak was the subject of a motion made by the defendants and heard by Judge Skinner prior to indictment. See Petition To Terminate The Grand Jury Proceedings, In Re: William Cintolo and Gennaro Angiulo. It is apparent that the program to chill Palladino began long before the trial in this case.

investigators from the I.R.S., it did not know until informed by the defense that Palladino had been told by the I.R.S. that he was under active investigation. See Tr. 115:113, 131-34. The government also pointed out that in its view the tapes established that Palladino was an associate of the Patriarca family of La Cosa Nostra with ties to the Gambino and DeCalvacante families in New York, Tr. 115:135; and that he engaged in interstate associations as part of a nationwide racketeering enterprise, Tr. 115:140. The government did admit that if Palladino did testify that the loan he received was legitimate, that testimony would be exculpatory.[5] See Tr. 115:147.

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[5] Gennaro Angiulo's counsel informed the court that his proffer concerning Palladino's exculpatory testimony was based on his interview of Palladino and others. Tr. 117:10.

The next day the defendants moved orally and in the alternative that the government immunize Palladino. Tr. 116:122. The government took the position that the court had no power to order the government to obtain immunity. Tr. 116:128. The court then questioned Palladino's attorney and Palladino under oath. Palladino claimed the fifth amendment to the court's questions about the loan at issue. See Tr. 126:163-65. His attorney stated that Palladino wouldn't testify even with judicial immunity as long as there was a question about the court's authority to grant such immunity. Tr. 116:187.

The next day his attorney informed the court that Palladino would not even testify in camera because that record could possibly be unsealed in the future, and Palladino testified that he accepted his attorney's advice. See Tr. 117:7-8, 12. The

defendants' motion for immunity was denied. Tr. 118:9.

Smoot

The government's theory at trial was that Donald Smoot was the victim of two separate extortionate extensions of credit in the spring of 1981, one from Ilario Zannino in the amount of fourteen thousand dollars (count 11) and the second from the Angiulos in the same amount (count 12). The government's proof of its theory centered on the testimony of Donald Smoot and one key tape recorded conversation, enhancement 675.[6]

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[6] The petitioners do not concede the accuracy of the transcripts, including the voice identifications. The jury could have reasonably rejected large portions of the government's transcript claims. See for example the government's admission during final argument concerning the so-called LaFreniere murder conversation that the jury may have heard only bits and pieces. Tr. 123:65. Here, however, the government's version of this conversation is presented.

According to the government, on April 30, 1981 at 98 Prince Street the following portion of a conversation occurred.

Gennaro Angiulo:	Leave Smoothie alone. I'm going to .... him.
Ilario Zannino:	No wait till I get my fourteen from him .... .
Gennaro Angiulo:	.... .
Donato Angiulo:	He's gonna bring twelve tonight.
Ilario Zannino:	Good; give it to .... .
Gennaro Angiulo:	Why did you have to say that?
Ilario Zannino:	I know Dominic .... .
Gennaro Angiulo:	I would never say it.
Ilario Zannino:	And tell him he owes two. All right?
Donato Angiulo:	You want that out of here or you w a n t t h a t yourself? Cause he owes you fourteen too. How

many fourteens does he owe?

Ilario Zannino: He owes me fourteen thousand.

Donato Angiulo: Is that the one that's over here?

Ilario Zannino: Yeah. Which one you talking about? There's another one.

Donato Angiulo: That's what I'm talking about. Is there another fourteen?

Ilario Zannino: What did he tell you? Let's get this straightened out.

Dominic Isabella: He showed me a check for .... twelve thousand.

Ilario Zannino: Give who? That must be mine. I don't care, you can take it.

Donato Angiulo: I don't care .... one way or the other.

Gennaro Angiulo: You mean he owes more than one fourteen?

Donato Angiulo: Took me by surprise today.

Unknown Male: Well, I don't blame him if he get his .... .

Ilario Zannino: He told Dominic, he said "Dominic here's one week. I'm gonna give you the other week tomorrow and twelve thousand." Did he tell you that?

Dominic Isabella: Exactly.

Ilario Zannino: Well, take that off of mine and .... . Frank tell him he owes me two, he gives you the twelve. All right?

Gennaro Angiulo: Migel, tomorrow go down the airport and case these tickets and get me all .... off the check .... okay? Take these before .... . Say "listen we didn't use em; we didn't use em. Gimme." Tell em, "gimme the cash;" they give you a check

okay. And here's another one for Eastern here. Cash that too ....

Francesco Angiulo: Let me get this straight .... when he comes he owes me fourteen from the game.

Ilario Zannino: I know that.

Francesco Angiulo: Now which one you want him to pay.

Ilario Zannino: What did he say to you today? He wanted to pay mine first. He told me that last week.

Francesco Angiulo: All right.

Ilario Zannino: All right.

Francesco Angiulo: All right.

Ilario Zannino: So you can ask him. .... "what is this for? Who? Says "Larry". Take it. Tell him "well you owe two more, according to Larry." All right. I keep taking shots with these guys .... make a fucking living. Fuck em.

I haven't .... have I? I took over sixty didn't I? Everyone backed away like fuckin dogs. Guy owes fifteen ....

Gennaro Angiulo: Nothing wrong with that.

Donald Smoot's testimony concerning the existence of a second loan was no more enlightening. He testified that in the spring of 1981 he owed fourteen thousand dollars to Ilario Zannino as a result of losses at the North Margin Street card game. Tr. 51:26. He owed the money for about a month or two. Tr. 57:25. Donato Angiulo would occasionally pick up an interest payment on that loan. Tr. 51:35-36, 49.

He also testified that he would occasionally borrow money from Donato Angiulo and would be charged two and a half percent interest per week. Tr. 51:36. Donato Angiulo would charge him interest

because he didn't want him to gamble. Tr. 51:41. He said that he owed money to Donato Angiulo in 1981. Tr. 51:40. When asked during what period of time in 1981, he replied that when his wife died on Labor Day, he borrowed four thousand dollars as a friend and wasn't charged interest. Tr. 51:40-41. When asked if he borrowed money from Donato Angiulo prior to that time, he again answered, occasionally. Tr. 51:41. This theme was revisited with the government asking how much money he owed Donato Angiulo in the "spring" of 1981, and Smoot again replying, around four thousand dollars. Tr. 51:96. In answer to the question of whether it could have been more, he answered, "It could have." Tr. 51:96. He said he had a running account with Donato Angiulo that went up and down depending on how he was faring in gambling. Tr. 51:96.

In terms of his state of mind, Smoot

testified that he was vaguely aware that if he failed to make a payment he could be threatened with physical harm. Tr. 51:96-97; Tr. 52-75. He testified that he believed Donato Angiulo was connected with organized crime. Tr. 51:118.

On cross-examination Smoot testified that Donato Angiulo and he were life long friends. Tr. 52:31. He said their families were friends, would visit, and still did. Tr. 52:30. Their sons played together, and graduated high school together. Tr. 52:30-31. He described Donato Angiulo as a gentleman. Tr. 52-82. He said he knew that Donato Angiulo would never do anything to cause him any harm. Tr. 52:98-99. He also said that he knew Donato Angiulo knew that he believed that. Tr. 52:99.

Five Gambling Businesses Or One

The defendants first raised the problem of multiple gambling businesses in a pre-trial motion. See Joint Motion Of Defendants To Dismiss And Strike Certain Enumerated Predicate Acts Of Racketeering, filed 2/27/84. The issue was addressed during the cross-examination of the expert gambling witness, Agent Eberhart. See Tr. 26:21-27. At the charge conference the defense alerted the court to its continuing position that the government was not permitted to break one gambling business "into five separate crimes". Tr. 1/16/86:40-41. The defense raised the issue again during Rule 29 arguments, suggesting that the government's evidence showed one gambling enterprise which had various aspects to it. See Tr. 120:102-104. The defendants requested an instruction directing the jury's attention to the

problem of whether the government had proved one gambling business or five separate and distinct businesses. See Francesco Angiulo's Request For Instructions. The trial court's charge on the five alleged §1955 gambling counts, see Tr. 127:67-82, failed to bring this issue to the jury's attention. At the conclusion of the charge, the defendants saved their rights to the failure to give an instruction. Tr. 127:143. On inquiry by the court, the government took the position that there was no need to give a multiple business instruction. Tr. 127:143.

The government's position that a multiple business instruction was not required can only be described as extraordinary. Given its view that the predicate acts enumerated in the indictment were committed in furtherance of the affairs of an enterprise, it is clear as a matter of

simple logic that the evidence was bound to raise the issue of whether each gambling activity charged was an independent business or assimilable into one overall operation.

Voice Identification

At trial the government relied on Agent Quinn for its claim that a defendant was the speaker on tape recorded conversations introduced in evidence. Agent Quinn of the FBI opined that he was familiar with the tone and characteristics of a defendant's voice, and that he was the speaker who made the statements attributed to him in the transcripts of the tape recorded conversations. See Tr. 4:161. Not only was this identification testimony the critical foundation for the tape recorded conversations played to the jury at trial, but also for the government's two key expert witnesses. Both gambling expert Eberhart and La Cosa Nostra expert Nelson assumed the

Quinn voice identifications to be accurate in reaching their expert opinions.

The problem of identifying speakers was a most difficult task. Agent Quinn testified that during the period of surveillance over a hundred individuals entered 98 Prince Street. Tr. 8:179. The video camera could not distinguish between those who entered the front door and went to the second or third floor, and those who went into the first floor apartment where the listening devices were located. See Tr. 7:147-149.

Agent Quinn testified that there was a great deal of background noise on the tapes. Tr. 3:47. The principal cause was a radio which was on during virtually all of the conversations and a television which was on during the majority of the conversations. Tr. 3:47. In addition there was frequent noise made by a CB and also a scanner. Tr.

3:47. The audibility and intelligibility of the tapes was a major issue at trial.

Agent Quinn admitted that some speakers on the tapes were identified one way and subsequently identified as somebody else. Tr. 8:167. He refused to estimate how many times that occurred. Tr. 8:167. Agent Quinn admitted that he had made an identification on two or three tapes of a speaker as Maurice Mizrahi. Tr. 6:44. He had a picture from the video at the time that he thought was a picture of Mizrahi. Tr. 9:22-23. He actually met with Mizrahi. Tr. 9:26. He had made his identification based on speaking with Mizrahi, and on the context. Tr. 6:43. However, after empanelment commenced in the case at bar, he changed his identification of Mizrahi. See Tr. 6:49.

Quinn's failure to equivocate in his identification of a defendant and the

constant reminder of those identifications in the form of transcript attributes made it critical to put his opinion evidence in the proper legal context.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The issue of how to evaluate the refusal to grant immunity to a defense witness has divided the Circuits and is a recurring issue with significant impact on the right to a fair trial. It is difficult to imagine a more fundamental problem for a defendant at a jury trial than the inability, through no fault of his own, to produce the testimony of the alleged victim that he was not a victim at all.

2. The jury instruction given at trial concerning the Smoot extortionate credit transaction permitted the jury to convict on a charge not made against the defendants in the indictment or at trial in

violation of the most basic notions of due process. See Dunn v. United States, 442 U.S. 100, 106 (1979). The sleight of hand analysis of the First Circuit on this issue in effect overrules Dunn.

3. In its holding that the trial court did not have to instruct the jury that the government must prove separate businesses in order to obtain multiple §1955 gambling convictions the First Circuit in effect overruled Sanabria v. United States, 437 U.S. 54 (1978). In addition, the First Circuit's analysis of the trial court's failure to give a theory of defense instruction is in conflict with that of other circuits. The failure to give the requested instruction here would result in reversal in both the Sixth and Ninth Circuits.

4. The question of when a defendant's theory of the case - voice identification

here, can be left out of the trial court's instructions is of fundamental importance. There is a conflict in the Circuits as to the appropriate test to be applied, and the failure here to give an instruction supported by the evidence would have resulted in reversal in both the Sixth and Ninth Circuits.

5. The question of whether or not the RICO Statute gives fair notice as to the meaning of the term "pattern of racketeering activity" is at the heart of the legitimacy of RICO prosecutions.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT ORDERING IMMUNITY FOR THE ALLEGED VICTIM OF AN EXTORTIONATE CREDIT TRANSACTION, JOSEPH PALLADINO.

As discussed at some length in the First Circuit's opinion, the appropriate legal framework for evaluating a claim for defense witness immunity is a subject that

has split the Circuits. See, e.g., United States v. Pennell, 737 F.2d 521, 526 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). This case raises the issue in sharp focus because it was the alleged victim the defense wanted immunized. Under either theory developed in the various circuits - effective defense and prosecutorial misconduct - the witness here should have been immunized.

At a minimum the Sixth Amendment provides a defendant the right to put before the jury evidence that might influence the determination of guilt. Pennsylvania v. Ritchie, 107 S. Ct. 989, 1001 (1987); see also, Webb v. Texas, 409 U.S. 95 (1972). This guarantee is meaningless if a defendant can be prevented from putting the exculpatory testimony of the alleged victim before the jury.

Here, Mr. Palladino went from being a

mere victim (when the government wanted the testimony of his attorney), to a perjurer (when the defense first mentioned that he was an appropriate witness), to a pornographer, tax cheat, associate of the Patriarca family of La Cosa Nostra and interstate racketeer (when the defense attempted to present him as a defense witness). To suggest that the government engaged in a concerted effort to turn up the heat to make sure that Palladino would understand the full consequences of defense oriented testimony would be to engage in extreme understatement. See United States v. Morrison, 535 F.2d 223 (3rd Cir. 1979).

This Court should not countenance the ands, ifs, and buts that allow such a situation to be considered consistent with the demands of due process.

II. THE TRIAL COURT'S INSTRUCTION ON COUNT 12 PERMITTING CONVICTION OF THE PETITIONERS ON THE SMOOT EXTORTIONATE CREDIT COUNT FOR CONDUCT NOT ALLEGED THEREIN VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS.

The government's original indictment alleged two separate and distinct extortionate extensions of credit made to Donald Smoot in the amount of fourteen thousand dollars. Count 11 charged Ilario Zannino with the substantive crime of making one of those extensions of credit and count 12 charged Gennaro, Nicolo, Donato and Francesco Angiulo with a conspiracy to make the other. The government's opening statement included a discussion of these "separate" debts, and a claim that Smoot owed the Angiulos money "as a result of losses at [the North Margin Street] card

game".[7] See Tr. 2:59.

Long before the government presented its loanshark evidence to the jury, the defendant Zannino was severed from the trial. Smoot testified that in the spring of 1981 he owed Zannino fourteen thousand dollars as a result of his losses at the North Margin Street card game. Tr. 51:26. He claimed he would pay the weekly payment to either Donato Angiulo or John Cincotti. Tr. 51:26. He also testified that in addition to the Zannino loan, in the spring of 1981 he owed Donato Angiulo around four thousand dollars or more. See Tr. 51:41, 96. During Donald Smoot's direct testimony, at a side bar conference, the government made it clear that its position was that "there are two separate fourteen thousand

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[7]This was an erroneous blending of the evidence, since Smoot testified it was the Zannino loan that originated in the North Margin Street card game.

dollar loans." Tr. 51:68-69. The defense position was that the same tape recording, enhancement 675, that convinced the government that there were two loans, actually indicated that there was only one loan, and that it was made by Zannino. See Tr. 51:73-74, 77. The court examined the government's transcripts of the tape recordings on this issue and concluded that the jury could decide either that there was one or two fourteen thousand dollar loans. See Tr. 51:80-81. Smoot was then not cross examined on the Zannino loan.

In resisting the defendants' Rule 29 argument that the government's case depended on its ability to prove a second fourteen thousand dollar loan, the government insisted that it had proved two loans, a Zannino and an Angiulo loan both in the amount of fourteen thousand dollars. See Tr. 121:22, 30-31.

In closing, the government again blended the evidence of the Angiulo loan with the evidence of the Zannino loan, claiming that Smoot borrowed money from Donato Angiulo as a result of losses at the North Margin Street card game. See Tr. 122:115-16. The government told the jury that the specific charge in the indictment concerned the fourteen thousand dollar debt discussed in enhancement 675. See Tr. 122:117. The government argued that Frank Angiulo was the accountant for both loans. See Tr. 122:118.

The defendants argued to the jury that the Zannino loan was not the loan charged in the indictment and that there was no second fourteen thousand dollar loan. See Tr. 124:91-93. In rebuttal the government insisted, referring again to enhancement 675, that there was a second fourteen thousand dollar loan. See Tr. 126

(p.m.):46.

The jury, of course, was not read or given Count 11 to decide. The trial court in explaining Count 12 to the jury said,

> "There are two elements which must be proved in order for you to find the charged defendants guilty of the offense charged in Count 12. The government must prove each of these elements beyond a reasonable doubt.
>
> First. That the conspiracy to make an extortionate extension of credit to Donald Smoot in the amount of $14,000 was willfully formed and existed at or about the time alleged in the indictment. And that it is from on or about March 1981 up to and including May 1981; and
>
> Second. That the defendant under your consideration willfully and knowingly became a member of that conspiracy". Tr. 127:83-84.

The problem with this instruction was that it completely submerged the issue of whether the government had proved a second fourteen thousand dollar loan, separate and apart from the Zannino fourteen thousand

dollar loan. It invited the jury to convict on proof of Angiulo participation in the Zannino loan. At the conclusion of the charge the defendants objected to the failure of the court to instruct that Count 12 did not charge the Zannino loan. See Tr. 127:140-141. The court declined to do so.

An instruction is adequate when it leaves no doubt as to the circumstances under which the crime can be found to have been committed. United States v. McMahon, 861 F.2d 8, 12 (1st Cir. 1988). The Zannino loan was not the theory on which Count 12 was indicted or tried. Few constitutional principles are more fully established than a defendant's right to be heard on the specific charge of which he is accused. Dunn v. United States, 442 U.S. 100, 106 (1979). Conviction upon a charge not made would be sheer denial of due process. DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

If not for the unfortunate coincidences of Zannino's severance (resulting in the redaction of the Zannino loan from the indictment) and of the alleged Zannino and Angiulo loans being identical in amount and the approximate time of extension, the instruction given would have clearly identified the government's theory of prosecution. But in the face of those coincidences, the trial court was obligated to differentiate Count 12 from the Zannino loan. The First Circuit's claim that the jury had the redacted indictment and a copy of the charge while true, is an exacerbating not a mitigating factor. Those documents served as a constant reminder during deliberations that a conviction could be predicated on the Zannino loan. Nor does the First Circuit's argument that the lawyers explained the issue to the jury mitigate the problem. The government mixed

the evidence on the two loans constantly. But more importantly, the law of the case comes from the Court not the lawyers. The jury was bound to follow the Court's directions. If Dunn is not to be overruled, the convictions on Count 12 can not stand.

III. THE TRIAL COURT INVADED THE PROVENCE OF THE JURY BY DECIDING IN EFFECT THAT THE GOVERNMENT HAD PROVED FIVE SEPARATE §1955 GAMBLING BUSINESSES AS A MATTER OF LAW AND REFUSING TO SUBMIT THE ISSUE FOR THE JURY'S CONSIDERATION.

In this case the trial judge apparently believed that he could decide as a matter of law that the gambling businesses that were the subject of the government's evidence were distinct and separate businesses. In so deciding, he overruled sub silentio Sanabria v. United States, 437 U.S. 54 (1978).

The fact that a given §1955 count in the indictment may have alleged a different

state law violation from that in other §1955 counts is of no moment. Under §1955, participation in a single gambling business is but a single offense, no matter how many statutes the enterprise violated. Sanabria v. United States, supra at 70-71. The allowable unit of prosecution is defined as participation in a single illegal gambling business. Id., at 70. Dividing an allowable unit of prosecution into a series of separate crime violates the double jeopardy clause. Brown v. Ohio, 432 U.S. 161 (1977).

Here it was the government's overarching theory that there was a network of component gambling operations revolving around Francesco Angiulo as the accountant and his brother Gennaro Angiulo as the boss. The failure of the trial court to appropriately focus the jury's attention on this issue of one or five businesses was

both extraordinary and prejudicial. This failure completely submerged the defendants' theory of defense to the gambling counts.

The First Circuit's test as to when the failure to give a requested theory of defense instruction amounts to error is consistent with the test employed by the Fifth and Eleventh Circuits.

> "[t]he refusal to give a particular requested instruction is reversible error only if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense."

United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984) (quoting from United States v. Grissom, 645 F.2d 461, 464 (5th Cir. 1981).

See also United States v. Walker, 720 F.2d 1527, 1541 (11th Cir. 1983), cert. denied 465 U.S. 1108 (1984).

However, both the Sixth and Ninth Circuits reject this approach. Reasoning that the right to have the jury instructed on a defendant's theory of the case is too basic to a fair trial, the Ninth Circuit holds that the failure to instruct on a theory where there is evidence to support it is reversible per se. United States v. Escobar De Bright, 742 F.2d 1196, 1201 (9th Cir. 1984). See also United States v. Duncan, 850 F.2d 1104, 1117-1118 (6th Cir. 1988), cert. denied, 110 S.Ct. 732 (1990). In the Sixth or Ninth Circuits the failure to give the one business only defense instruction would have resulted appropriately in a finding of reversible error.

IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF MISTAKEN VOICE IDENTIFICATIONS.

The petitioners in the case at bar requested instructions (1) that voice identification testimony must be received with caution and scrutinized with care; (2) that the government must prove beyond a reasonable doubt the identity of an alleged perpetrator; (3) that a witness may be impeached by prior inconsistent statements. See Defendant Donato Angiulo's Proposed Jury Instructions Nos. 4 and 7. At the conclusion of the charge the petitioners objected to the court's failure to give these instructions. See Tr. 127:140, 142.

The identification instruction requested here is the recommended one in the First Circuit. See United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978). The failure to give it was seriously compounded

by the failure to direct the jury's attention to the factors to be weighed in assessing Agent Quinn's credibility.

The petitioners' sole argument in closing to the jury on the numbers betting count was the question of voice identification. See Tr. 124:57, 61-65. The trial court's decision to deny the petitioners an instruction on their theory of the case effectively removed that issue from the jury's consideration.

As discussed in section III above, this omission would not be tolerated in the Sixth or Ninth Circuits. It should be reversible error to fail to present the defense theory adequately in a full statement of the law when there is an adequate factual basis. See Bird v. United States, 180 U.S. 356, 361 (1901).

Here the First Circuit concedes the factual basis for the defense theory, but

ironically claims that defense counsel's closing argument in effect was an adequate substitute for proper instructions from the court.[8] This type of claim has been rejected by the Sixth Circuit. United States v. Duncan, supra, at 1117-1118.

Because the petitioners were entitled to a theory of defense instruction and did not receive it, their convictions should be reversed.

V. THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT OF THE RICO STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The due process clause of the Fifth Amendment to the United States Constitution prohibits the prosecution of a

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[8] Apparently the First Circuit believes that if you argue the defense vigorously there's no need for an instruction; but if you fail to argue it vigorously, then it was not important enough as an issue to seriously impair the defense. See the First Circuit's analysis of the "one business" only defense.

person pursuant to a statute whose terms are so vague that he must guess at their meaning. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

RICO, of course, does not contain a definition of the term "pattern of racketeering activity." All that is said in the statute is that a pattern "requires" at least two acts. This Court and the courts of appeals have struggled to fill in the interstices left by Congress. E.g. H.J. Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S.Ct. 2893 (1989); Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

In Northwestern Bell, the Court noted "the plethora of different views expressed by the courts of appeals since Sedima [S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)]" and observed that "... developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." ___ U.S. at ___, 109 S.Ct. at 2899. The Court resorted to lexicography, analogy to other provisions of the Organized Crime Control Act of 1970, and canvassing the legislative history to complete its analysis. It concluded that the concept of pattern embodies two distinct requirements -- (1) the predicate acts must be related to one another, and (2) there must be continuity among the predicate acts, or at least the threat of continuity. Recognizing that the phrase "continuity plus relationship" does not fully explicate the meaning of the term "pattern of racketeering

activity," the Court conceded that the "limits of the relationship and continuity concepts ... cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." ___ U.S. at ___, 109 S.Ct at 2902.[9]

Justice Scalia, joined by three other Justices, concurred, but argued that the majority's opinion does little more than substituting one slogan -- continuity plus relationship -- for another -- pattern of racketeering activity. Justice Scalia found the majority opinion interpreting the

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[9] In rejecting an earlier challenge to the RICO statute, the Ninth Circuit observed that if the statute failed to provide a satisfactory definition of the term "pattern of racketeering activity," the statute would not survive a vagueness challenge. United States v. Campanale, 518 F.2d 352, 364, cert. denied, 423 U.S. 1050 (1975). After Sedima and Northwestern Bell, it is clear that the statute does not fulfill this constitutional requirement.

"enigmatic term" to be inadequate. ___ U.S. at ___, 109 S.Ct. at 2906. However, Justice Scalia conceded that he was unable to offer any interpretation of "pattern" that gives more guidance concerning its meaning and application. He also speculated that RICO might not survive a constitutional challenge on vagueness grounds because of this serious ambiguity. ___ U.S. at ___, 109 S.Ct. at 2908.

Even this Court's recent efforts to inform the ambiguous, undefined phrase "pattern" may not be enough to give ordinary people fair notice that their conduct might be deemed to be a pattern. It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. "It would be hard to hold that, in advance of any judicial utterance upon the subject, [the defendants] were bound to understand the

challenged provision according to the language later used by the court." Lanzetta v. New Jersey, 306 U.S. 451, 456 (1939).

As to petitioner Donato Angiulo the two predicate acts on which he was convicted bore no relationship to each other. As to Gennaro and Francesco Angiulo, the general RICO verdict returned makes it impossible to determine which predicates formed a pattern in the jury's mind. Under the circumstances, the petitioners would have had to speculate about whether their conduct fell within the parameters of the RICO statute. Because the statute furnishes no guide by which one can reasonably determine whether conduct may be penalized as a pattern by the RICO statute, the trial court erred in denying the petitioners relief. Accordingly, this Court should grant the petition to decide whether RICO may be applied to predicate acts which are not related to each other, but only to

the alleged enterprise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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June 21, 1990